No. 18,240

United States Court of Appeals
For the Ninth Circuit

JANE G. WEST and RALPH E. WEST,
Appellants,

vs.

RUTH SHIZUKO TAN, individually and doing business as BANYAN INN,
Appellees.

Appeal from Judgment of the District Court of the United States for the District of Hawaii, Civil No. 1729

Honorable C. Nils Tavares, Judge Presiding

APPELLANTS' OPENING BRIEF

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I.

INTRODUCTION

This is an appeal by Jane G. West and Ralph E. West, her husband, from a judgment notwithstanding jury verdict which was rendered against them by the District Court of the United States for the District of Hawaii.

The action arose out of personal injuries suffered by the appellant Mrs. West at the restaurant operated by appellee Mrs. Tan.

The jury, by unanimous verdict, awarded appellants damages in the total amount of $10,848.06, which said verdict was set aside by the court and judgment entered for defendant.

II.

JURISDICTION

The jurisdiction of the trial court arose under Section 1332, 28 U.S.C.A., diversity of citizenship of the parties, with the amount in controversy exceeding the sum of $10,000.00. The factual basis for jurisdiction is to be found in the recitations of the pre-trial order. (Clk.Tr. p. 25.)

The appellate jurisdiction of this Court is to be found in Section 1291, 28 U.S.C.A., namely, the appellate jurisdiction of this Court from final judgment rendered by the trial court. (Clk.Tr. p. 42.)

III.

STATEMENT OF THE CASE

The case involved here is a simple one. The detailed facts, with appropriate references to the transcript, are set forth below under the heading V-B.

Briefly, appellant Jane G. West and her husband, while visiting in Hawaii, went to dinner at the restaurant owned and operated by appellee Mrs. Tan. While there, Mrs. West went to the bandstand to play the piano. After playing the piano, Mrs. West, while descending from the bandstand, fell and suf-

fered the injuries involved in these proceedings. None of these facts was disputed at the trial of the case.

The issues in the trial Court were the claimed negligence of defendant in maintaining the bandstand poorly lit and without adequate safeguards, the claimed contributory negligence, the area of invitation extended to Mrs. West by defendant, and the extent of damages. Since none of these issues is involved on this appeal, we have not cited the same to the record except as follows: The jury returned a unanimous verdict in favor of appellants, which said verdict was set aside by the trial Court upon the ground that as a matter of law plaintiff was a mere licensee, that as a matter of law there was no evidence of defendant's negligence, and that as a matter of law plaintiff assumed the risks involved. (Clk.Tr. pp. 38-41.)

The Court thereupon set aside the verdict and entered judgment for defendant. (Clk.Tr. p. 42.) Inasmuch as, as is discussed below under heading V-A, the sole question is whether there was substantial evidence to support the verdict of the jury, there is set forth below, cited to the transcript, the evidence presented to the jury which supports the verdict entered by the jury.

IV.

ERROR CLAIMED

It is claimed that the trial Court erred in setting aside the verdict of the jury upon the ground that

there was no substantial evidence to support the same. Appellant contends, and shows by appropriate references to the transcript below, that the evidence not only fully supports the verdict of the jury, but compelled verdict in her favor.

V.

ARGUMENT

A. LAW

The usual order of presentation of a case on appeal is first to set forth the facts and then the law.

We are inverting the customary order here in order to demonstrate more clearly the correctness of appellants' contention.

The legal point involved is simply that the trial Court committed error in setting aside the verdict of the jury upon the ground that the same was not supported by the evidence. This Court has repeatedly held that the trial Court cannot assume the functions of the jury in weighing the evidence. The trial judge in this case wrote an opinion of some four pages (Clk.Tr. pp. 38-41), which said opinion discusses evidentiary matters. However, the recitation of the evidentiary matters appearing in the said opinion of the trial Court, unfortunately, reviewed only the evidence favoring defendant and omits the evidence, and inferences, which favor the plaintiffs. In this, with all due respect to the trial Court, it is contended that the trial Court erred.

As was said by this Court in *Butte Copper & Zinc Co. v. Amerman*, 157 Fed.2d 457:

> "A court on request for a directed verdict may not weigh the evidence. If there is substantial evidence both for the plaintiff and defendant, it is for the jury to determine what facts are established. (Citing authority.) This is true even though their verdict be against the decided preponderance of the evidence. (Citing authority.)
>
> "The court, on motion for directed verdict, is not confronted with the question of whether there is 'literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.' (Citing authority.) So, if there is substantial, relevant evidence in favor of the party against whom the motion for directed verdict is made, it is error for the trial court to grant the motion directing the verdict. (*U. S. v. Burke*, 9th Circ., 50 Fed.2d 653, 656; *Corrigan v. U. S.*, 9th Circ., 82 Fed.2d 106, 109, 110; *U. S. v. Hartley*, 9th Circ., 99 Fed. 2d 923, 925.)"

See also language used by this Court in *Southern Pacific v. Heavingham*, (1956) 236 Fed.2d 406, 409:

> "The present course of decision of the Supreme Court, differing from the suggested conclusion in the *Craft* case, is stated in *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29, 35, 64 S.Ct. 409, 412, 88 L.Ed. 520, as follows: 'It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain

> inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. * * * That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable'."

The question on this appeal, therefore, resolves itself to this: What substantial evidence is there in the record to support the unanimous verdict of the jury?

B. THE FACTS

Plaintiffs went to the Banyan Inn for dinner, the Banyan Inn being a restaurant owned and operated by defendant. They had never been there before. (Rep. Tr. p. 52, ll. 23-24; p. 267, ll. 14-16.) It was about 8:00 or 8:30 at night, and it was dark. (Rep.Tr. p. 154, ll. 10-11.) Immediately adjacent to the area where plaintiffs and their party were seated for dinner, was a dance floor area made of concrete; at one end of the dance floor was a band platform, about 25 or 30 feet from where plaintiffs and their party were

seated for dinner. The dance floor and the platform were made of the same material and were the same color, a dark color. (Rep.Tr. p. 18, l. 18, to p. 20, l. 7.)

There were no musicians on the bandstand. (Rep.Tr. p. 155, ll. 4-6.)

A waitress presented menus to plaintiffs' party, took orders for dinner and a round of cocktails. (Rep. Tr. p. 20, ll. 10-17.)

On the platform was an upright piano, some folding chairs, and an electric light cord with a small electric light bulb. (Rep.Tr. p. 20, l. 21, to p. 21, l. 7.)

When the waitress returned with the cocktails, one of the members of plaintiffs' group asked the waitress "if it would be all right for Mrs. West to go up and play the piano. And the waitress said it would certainly be perfectly all right, something to the effect, wonderful." (Rep.Tr. p. 21, ll. 23-25.)

* * * *

> "Mr. West. Will you please tell us the language the waitress used?
>
> A. She said, 'Certainly, that would be wondeful'." (Rep.Tr. p. 22, ll. 22-24.)
>
> "She acted like the place needed some entertainment and she was glad to have it take place." (Rep.Tr. p. 77, ll. 4-5; Rep.Tr. p. 158, ll. 13-15.)

The waitress acted very pleased. (Rep.Tr. p. 216, ll. 4-6.)

Plantiffs Mr. and Mrs. West thereupon left their table and went to the platform. (Rep.Tr. p. 23, ll. 3-9; p. 167, l. 20 to p. 168, l. 9.)

The Banyan Inn is an informal type of restaurant, the waitress do not wear uniforms, sometimes muumuus, and guests come in aloha shirts. (Rep.Tr. p. 376, ll. 6-20.) Sometimes the guests do not even wear shoes. (Rep.Tr. p. 391, ll. 18-20.)

There was absolutely nothing warning the people not to go on the platform. (Rep.Tr. p. 23, ll. 3-9; p. 167 l. 20 to p. 168, l. 9.)

There were occasional electric lights in the dining area, fairly strong electric lights in the kitchen area, but no lights in the dance floor area or platform area, which was located some 40 to 50 feet away from the lighted area. (Rep.Tr. p. 23, l. 14, to p. 24, l. 21.)

Plaintiffs went to the platform area, set one of the folding chairs in front of the piano, and plaintiff Mrs. West commenced to play. (Rep.Tr. p. 25, l. 6, *et seq.*) Plaintiff Mr. West found a small light bulb connected to an electric light cord and turned on the same, which gave a very dim and reddish light with illumination equivalent to a small Christmas candle. (Rep.Tr. p. 25, l. 11, to p. 26, l. 13.) This light had to be held within 10 or 12 inches of the sheet music used by the plaintiff Mrs. West, and did not illuminate any of the rest of the platform area. (Rep.Tr. p. 27, ll. 6-10.) Specifically, this light did not illuminate the edge of the platform, some 4 to 6 feet away. (Rep. Tr. p. 27, ll. 9-17.)

Plaintiff Mrs. West played the piano for approximately ten mintes. (Rep.Tr. p. 27, ll. 18-20.)

The Inn was fairly crowded and quite busy. (Rep. Tr. p. 360, l. 18, to p. 361, l. 7.)

Two or three people who were guests at the restaurant, but not members of plaintiffs' party, came over and stood listening to the music for a while (Rep.Tr. p. 28, ll. 5-9); "They were smiling and enjoying it." (Rep.Tr. p. 79, l. 18.)

One of these other guests testified that he listened for some five or ten minutes (Rep.Tr. p. 435, ll. 19-23), that he "enjoyed the piano playing. It was good. It was good piano playing." (Rep.Tr. p. 399, ll. 20-22.)

There were two or three other tables occupied. (Rep.Tr. p. 185, ll. 21-24.)

No one told the plaintiff to stop playing the piano. (Rep.Tr. p. 28, ll. 10-11.)

The waitress who waited upon plaintiffs' table heard Mrs. West playing the piano, listened to her play the piano, enjoyed the music (Rep.Tr. p. 487, ll. 21-24), but made no attempt to stop her. (Rep.Tr. p. 369, ll. 4-8.) This waitress does not remember Mrs. Tan, the owner of the premises, ever saying anything to the waitresses that they should stop people from playing the piano. (Rep.Tr. p. 489, ll. 20-24.)

Defendant, Mrs. Tan, the owner of the restaurant, was present that evening (Rep.Tr. p. 449, ll. 14-17), saw plaintiffs' party come in and be seated at their table, which had been reserved. (Rep.Tr. p. 452, ll. 10-16.)

Mrs. Tan heard the piano playing, inquired who was playing the piano, was told that a lady was playing the same. (Rep.Tr. p. 454, ll. 7-14.) Mrs. Tan saw Mrs. West playing the piano, watched her for some

four or five minutes (Rep.Tr. p. 478, ll. 6-11), but did nothing to stop her. (Rep.Tr. p. 455, ll. 18-25.) She did not tell any of her waitresses to stop Mrs. West playing the piano. (Rep.Tr. p. 474, ll. 20-22.)

Mrs. Tan's husband was present at the restaurant all evening. (Rep.Tr. p. 464, ll. 11-15.) He did nothing to stop Mrs. West from playing the piano. (Rep.Tr. p. 475, ll. 11-14.)

The waitress eventually came up to plaintiffs to announce that dinner was being served, whereupon plaintiff Mrs. West finished playing the number she was then playing, and turned to leave the platform and suffered the fall involved here. (Rep.Tr. p. 28, ll. 12-23.)

Immediately after her fall, while plaintiff was on the floor, she looked at the platform and exclaimed, "No wonder, look at the height of that step." (Rep. Tr. p. 29, ll. 5-7; p. 224, ll. 9-13.)

Mrs. West testified that there was nothing to show the edge of the platform; that the platform and the dance floor looked like it was all one floor. (Rep.Tr. p. 222, ll. 2-24.)

The top of the platform was in semi-darkness and looked brown in color, the same color as the dance floor. (Rep.Tr. p. 29, ll. 8-12; p. 223, ll. 5-23.) The platform was about 12 inches above the dance floor. (Rep.Tr. p. 29, ll. 17-18; p. 67, ll. 15-21.) There was no step between the platform and the dance floor, the bandstand dropping directly to the dance floor. (Rep. Tr. p. 154, l. 24, to p. 155, l. 3.)

There was nothing to distinguish the edge of the platform. (Rep.Tr. p. 30, ll. 8-10.)

The dance floor was not painted a different color from the platform. (Rep.Tr. p. 30, ll. 11-14.)

Mrs. West does not ordinarily wear glasses, only for reading or playing the piano. (Rep.Tr. p. 74, ll. 14-15.)

There was a bright light available to illuminate the platform area, but the same was not turned on until after Mrs. West fell. (Rep.Tr. p. 30, l. 20, to p. 31, l. 3.)

Mrs. West suffered extreme pain from the fall, underwent a surgical operation on her left elbow, traction, and prolonged treatment. (Rep.Tr. p. 34, l. 13, to p. 35, l. 16; p. 36, l. 24, to p. 37, l. 14; p. 39, ll. 5-11.)

There was some evidence that her injuries were to some extent permanent. (Rep.Tr. p. 342, ll. 1-15.)

At the conclusion of the case, the jury returned a verdict in favor of plaintiffs for a total of $10,848.06. (Clk.Tr. p. 27.) This verdict was unanimous. (Rep. Tr. p. 538, ll. 5-9.)

The foregoing constitutes a summary of the evidence favorable to plaintiff, which was overlooked by the trial Court in its determination that there was no evidence introduced to support the verdict returned by the jury.

It is respectfully submitted that the foregoing summary of plaintiffs' evidence not only fully supported the verdict of the jury, but almost compelled the

same. There was clear evidence of negligence in failure to illuminate the area properly, in failure to mark the area properly, in failure to safeguard in any way persons in the area in question. The evidence was uncontroverted that the owner did not in any way prevent plaintiffs from going to the area in question, nor indicate, by sign or otherwise, that the area was prohibited. Specifically, defendant knew that plaintiff was playing the piano, that her other guests were enjoying the same, that she was thereby deriving benefit therefrom, and yet did nothing directly or indirectly to dissuade plaintiff from her activities.

It can hardly be argued, save with tongue in cheek, that there was not substantial evidence from which the jury could find that the area of invitation open to plaintiffs included the area in which the accident occurred. It is likewise inescapable that no attempt whatever was made to provide even minimum protection for defendant's patrons by illumination, steps, rails, contrasting coloration between platform and dance floor, or otherwise.

While it is undoubtedly true that precedents are of but little value in cases of this type, we respectfully call the attention of this Court to the recent case of *Belle Heit v. Sha-Wan-Ga Lodge*, 288 Fed.2d 65, wherein the Court said:

> "On the day of the accident which gave rise to this litigation, plaintiff arrived with her cousin for a vacation at the Sha-Wan-Ga Lodge, a resort hotel operated by the defendant-appellant

in the Sha-Wan-Gunk Mountains of New York State. Access to their room was by a stairway to a landing, from which there was a step-up of about four inches to a covered porch from which the room opened. This step was not marked in any way, and both the landing and the porch were painted the same shade of gray. The porch had a white rail, or balustrade, which extended around and included the landing with no change in the level of its top. The view from the porch is of beautiful mountain scenery.

"Shortly after Miss Heit's first trip to the room, she returned, missed the step from the porch to the landing and sustained injuries to recover for which this action was brought. On trial to the court Judge Sugarman found the issues in favor of the plaintiff.

"Appellant's argument that there was no proof of a dangerous condition is without merit. New York law recognizes that a defendant may be negligent when, as here, coloring and other circumstances combine to create the optical effect of one level when more than one exists. *Bloch v. Frank G. Shattuck Co.,* 1st Dep. 2 A.D.2d 20, 153 N.Y.S.2d 964; *Hinkel v. R. H. Macy, Inc.*, Sup. Ct. N. Y. Cty, 201 N.Y.S. 211."

See, also, *Swift & Co. v. Schuster*, 192 Fed.2d 615, wherein it was held that questions of this type, that is, whether a reasonably prudent owner would provide steps or other safeguards, is a matter for the trial jury to determine.

See *Employees Liability Insurance Corporation v. Madden*, 219 Fed.2d 205, wherein a similar rule was

expressed. In that case plaintiff fell while *returning* to the area involved, and thus, obviously, had some knowledge of the conditions there existing. Nevertheless, it was held that the extent of care required of the owner was a matter for the jury to determine.

To the same effect see *Young Men's Shop v. Odend-'hal*, 121 Fed.2d 857, 858; *Hecht Company v. Harrison*, 137 Fed.2d 687.

Likewise in point is *Gleason v. Academy of the Holy Cross*, 168 Fed.2d 561. In that case the trial Court granted judgment for defendant notwithstanding verdict, which was reversed on appeal. There plaintiff fell while descending a step which was not readily visible the passageway and the steps being painted a uniform color. Plaintiff had used the steps twice before. Plaintiff had neither been forbidden nor expressly invited to use the steps. The rule was there correctly stated that the extent of invitation and the question of defendant's negligence in maintaining the step in question, as well as the question of contributory negligence, were all matters for the jury to determine.

See also *King v. Yancey*, 147 Fed.2d 379, wherein the Court reversed judgment entered by the trial Court for defendant with instructions that it was a question of fact for the jury to determine whether plaintiff was an invitee or licensee.

Somewhat pertinent is the language appearing in *Frey v. Russian Village*, 72 Fed.2d 261, at 262:

> "There is a well-recognized duty at common law resting upon the defendant to maintain the

stairway leading to its place of business in a reasonably safe condition for the use of the patrons it invites to use it. While this duty does not require any definite amount of lighting or any lighting at all if such a stairway is otherwise made reasonably safe for such use, the absence of sufficient light may render the stairway unsafe and be actionable negligence if it results in injury to an invitee. The defendant was bound to know what a patron would believe from appearances was the actual condition of the stairway when coming from the street to the top of the shadowy flight of stairs and take what precautions reasonable prudence under the circumstances required not to permit such a person to be deceived into thinking that the hand rail on the right could be grasped from the top stair. Whether or not it complied with its duty in this respect was a jury question. *Kern v. Great Atlantic & Pacific Tea Co.*, 241 N.Y. 600, 150 N.E. 572; *Greene v. Sibley, Lindsay & Curr Co.*, 232 App.Div. 53, 248 N.Y.S. 491; *Quirk v. Siegel-Cooper Co.*, 43 App.Div. 464, 60 N.Y.S. 228; *Graham v. Bauland Co.*, 97 App.Div. 141, 89 N.Y.S. 595; *Myers v. Pittsburgh Coal Co.*, 223 U.S. 184, 34 S.Ct. 559, 58 L.Ed. 906; *New York Lubricating Oil Co. v. Pusey* (C.C.A.) 211 F. 622."

It was expressly ruled in *Saddler v. Bethel*, 267 Fed.2d 805, 807, that the question of whether the lighting was so insufficient as to constitute negligence was a question to be resolved by the jury.

With regard to the observation appearing in the trial Court's decision (Clk.Tr. p. 38, *et seq.*) that Mrs. West certainly knew the conditions that existed in

the restaurant at the time she fell and was, therefore, guilty of contributory negligence, the attention of this Court is invited to the recent case of *Chance v. Lawry's, Inc.*, 58 A.C. 373, 24 Cal.Rep. 209:

> "Under the facts, the jury could have concluded that the open planter box, situated as it was in a narrow foyer of a busy restaurant, and which constituted a hazard when a patron merely stepped aside, as a matter of courtesy, to let another person pass, was a dangerous condition. There were no signs, barricades or warnings in front of the trench. There is substantial evidence to support the jury's conclusion that in the exercise of ordinary care in these circumstances Lawry's should have either obviated the danger or warned Mrs. Chance of its existence.
>
> "It is Lawry's main contention that, under the facts, it was under no duty to warn its patrons because the danger of the open planter box was so obvious that it could reasonably anticipate that patrons would see and apprehend the danger. Therefore, so it is argued, Lawry's owed no duty to warn Mrs. Chance of such a danger. (2 Witkin, Summary of Cal. Law (7th ed. 1960) p. 1457; *Seavey, Swift & Co. v. Schuster*—Liability to One Aware of Danger (1952) 65 Harv. L. Rev. 623, 625; Keeton, Personal Injuries Resulting from Open And Obvious Conditions (1952) 100 U. Pa. L. Rev. 629, 634.)
>
> "In our opinion this was a fact question for the jury.
>
> "Defendants also urge that even if Lawry's was under a duty to warn its patrons of the danger, the danger was so obvious that Mrs.

Chance must be held guilty of contributory negligence as a matter of law in not seeing it. 'To establish the defense of contributory negligence as against the verdict of a jury, the evidence must be such that the appellate court can say that there is no substantial conflict on the facts, and that from the facts reasonable men can draw but one inference, which inference points unerringly to the negligence of the plaintiff proximately contributing to his own injury.' (*Crawford v. Southern Pacific Co.*, 3 Cal.2d 427, 429, 45 P.2d 183, 184; see also, *Florez v. Gromm Development Co.*, 53 Cal.2d 347, 354, 1 Cal.Reptr. 840, 348 P.2d 200.) Defendants urge that this inference must be drawn since Mrs. Chance, Humphrey and Martini all testified that if they had looked they would have seen the planter box. Defendants rely on the familiar rule that a person is under a duty to look where he is going and to see that which is in plain sight in front of him. (*Atherley v. MacDonald, Young & Nelson, Inc.*, 142 Cal.App.2d 575, 585, 298 P.2d 700; *Blodgett v. B. H. Dyas Co.*, supra, 4 Cal.2d 511, 513, 50 P.2d 801.) But, as this court said in *Laird v. T. W. Mather, Inc.*, 51 Cal.2d 210, 218, 331 P.2d 617, 622, 'There are many cases involving accidents in mercantile establishments where the question of plaintiff's contributory negligence has been held to be a question for the jury even though the plaintiff failed to observe what may have been an obvious danger'."

VI.

CONCLUSION

From all of the foregoing, it is respectfully submitted that there was in this case clear and substantial evidence to support the verdict of the jury and that, therefore, the Court erred in setting aside that verdict and granting judgment for defendant.

Dated, San Francisco, California,
December 27, 1962.

Respectfully submitted,

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Attorneys for Appellants.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

GERALD O'CONNOR

Attorney